

transmitting said at least one instruct signal which is effective at said at least one receiver station to instruct one of a computer and a processor, a plurality of selective transfer devices each operatively connected to said one of a broadcast and a cablecast transmitter, said plurality of selective transfer devices each being adapted for communicating said at least one instruct signal, a receiver for receiving said at least one instruct signal from at least one origination transmitter station, a control signal detector, and one of a controller and a computer capable of controlling at least one of said plurality of selective transfer devices, said remote intermediate transmitter station being adapted to detect the presence of said at least one control signal, to control communication of a first instruct signal in response to said control signal, and to deliver at said one of a broadcast and a cablecast transmitter said first instruct signal, said method comprising the steps of:

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- [(1)] receiving said first instruct signal at said at least one origination transmitter station and delivering said first instruct signal to at at least one origination transmitter;
  - [(2)] receiving said at least one control signal which is operable at said remote intermediate transmitter station to control the communication of said first instruct signal; and
  - [(3)] transmitting said at least one control signal to said at least one origination transmitter before a specific time.

6. The method of claim 5, wherein said at least one control signal includes at least one of a code and a datum which operates at said remote intermediate transmitter station to identify at least one of said first instruct signal and some information associated with said first instruct signal, said method further comprising the step of:

transmitting a second instruct signal which operates at said remote intermediate transmitter station at said specific time to communicate said first instruct signal to said one of a broadcast and a cablecast transmitter.

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162

7. (Twice Amended) The method of claim 5, wherein said specific time is a scheduled time of transmitting one of said first instruct signal, some information associated with said first

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instruct signal and said at least one control signal is effective at said remote intermediate transmitter station to control at least one of said plurality of selective [transmission]transfer devices at different times.

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8. The method of claim 5, further comprising the step of embedding a specific control signal at least one of in said instruct signal and in an information transmission containing said instruct signal before transmitting said instruct signal to said remote intermediate transmitter station.

9. The method of claim 5, wherein said remote intermediate transmitter station communicates said first instruct signal according to a schedule, and a specific control signal is effective at said remote intermediate transmitter station to communicate said first instruct signal to one of said plurality of broadcast and cablecast transmitters at a plurality of times.

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10. (Twice Amended) A method of controlling a remote intermediate data transmitter station to communicate data to at least one receiver station, said remote intermediate data transmitter station including one of a broadcast and a cablecast transmitter for transmitting said data, a plurality of selective transfer devices each operatively connected to said one of a broadcast and a cablecast transmitter, a data receiver for receiving said data from at least one origination transmitter station, a control signal detector, and one of a controller and a computer capable of controlling at least one of said plurality of selective transfer devices, said remote intermediate data transmitter station adapted to detect at least one control signal, to control communication of said data in response to said at least one control signal, and to deliver said data at said one of a broadcast and a cablecast transmitter, said method comprising the steps of:

[(1)] receiving said data at said at least one origination transmitter station and delivering said data to at least one origination transmitter, said data comprising an instruct signal;

[(2)] receiving said at least one control signal which at said remote intermediate data transmitter station operates to control communication of said data; and

23. [3] transmitting said at least one control signal to said at least one origination transmitter before a specific time.

11. (Twice Amended) A method of controlling a remote television transmitter station to communicate television program material to at least one receiver station, said remote television transmitter station including one of a broadcast and a cablecast transmitter for transmitting television programming, a plurality of selective transfer devices each operatively connected to said one of a broadcast and a cablecast transmitter for communicating said television programming, a television receiver for receiving said television programming from at least one origination transmitter station, a control signal detector, and a one of controller and a computer capable of controlling at least one of said selective transfer devices, said remote television transmitter station being adapted to detect the presence of at least one control signal, to control the communication of said television programming in response to said at least one control signal, and to deliver at said one of a broadcast and a cablecast transmitter said television programming, said method comprising the steps of:

[(1)] receiving said television programming at said at least one origination transmitter station and delivering said television programming to at least one origination transmitter, said television programming including a plurality of images to be outputted at said at least one receiver station in a predetermined sequence;

[(2)] receiving said at least one control signal, which at said remote intermediate television transmitter station operates to control communication of said television programming; and

[(3)] transmitting said at least one control signal to said at least one origination transmitter before a specific time.

12. (Twice Amended) A method of controlling communication between an intermediate data transmitter station and a plurality of remote receiver stations, said intermediate data transmitter station having a plurality of transfer devices and one of a controller and a computer operatively connected to said plurality of transfer devices, each of said plurality of remote receiver stations having a signal detector and a receiver station processor, said plurality of remote receiver stations each being adapted to detect at least one control signal, said method comprising the steps of:

13  
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[(1)] receiving data at said intermediate data transmitter station, said data including (i) at least one of video, audio, text, and remote control signals, and (ii) an instruct signal which is operable to transmit some of said data from said plurality of remote receiver stations;

[(2)] receiving said at least one control signal at said intermediate data transmitter station, said one or more control signals being operative to delay transmission of at least a portion of said data; and

[(3)] transmitting said data, said instruct signal and said at least one control signal from said intermediate data transmitter station to said plurality of remote receiver stations.

13. (Twice Amended) A method of communicating television program material from a television transmitter station to at least one television receiver station, said television transmitter station including at least one of a broadcast and a cablecast transmitter, a selective [transmission]transfer device, at least one television programming source, a processor, at least one of a decoder and a detector, said one of a broadcast and a cablecast transmitter being adapted for transmitting a television signal to said one or more television receiver stations, said selective [transmission]transfer device being adapted for communicating at least one receiver control

signal, each of said at least one television programming source being adapted for outputting at least one television signal, said processor being adapted for identifying at least one signal[s], and said at least one of said decoder and said detector being operatively connected to said processor for at least one of decoding an identifier code and detecting at least one identifier datum, said method comprising the steps of:

- 3  
cont.
- [(1)] receiving and storing a selection control signal;
  - [(2)] receiving from at least one remote transmission station an information transmission containing said at least one television signal and at least one instruct signal;
  - [(3)] passing at least some of said at least one television signal to said at least one of said decoder and said detector and at least one of decoding and detecting said at least one instruct signal;
  - [(4)] controlling said selective [transmission]transfer device to communicate said at least one receiver control signal based on said selection control signal and said at least one of decoded and detected at least one instruct signal;
  - [(5)] communicating said television signal from said at least one television programming source to at least one of said one of a broadcast and a cablecast transmitter based on said step of controlling said selective [transmission]transfer device; and
  - [(6)] transmitting said television signal and said at least one receiver control signal to said one or more television receiver stations.

14 (Twice Amended) The method of claim 13, wherein said selective [transmission]transfer device includes a plurality of outputs, said method further comprising the step of:

controlling said selective [transmission]transfer device to transfer said television programming to each of said plurality of outputs.

15. (Twice Amended) The method of claim 13, wherein said selective [transmission]transfer device includes a plurality of inputs, said method further having one step from the group consisting of:

controlling said selective [transmission]transfer device to transfer some of said television programming from one of said plurality of inputs in accordance with said selection control signal;

controlling said plurality of selective [transmission]transfer devices to transfer some of said television programming from at least one of said plurality of inputs on the basis of said instruct signal; and

controlling said plurality of selective [transmission]transfer devices to transfer some of said television programming from each of said plurality of inputs.

16. The method of claim 13, wherein said selection control signal is a schedule for transmitting television programming contained in said at least one television signal and said at least one instruct signal designates one or more units of said television programming, said method further comprising the steps of:

selecting said at least one television programming unit on the basis of said instruct signal;

and

transmitting said unit of television programming according to said schedule.

17. (Twice Amended) The method of claim 13, wherein said television transmitter station receives a plurality of instruct signal types from said at least one remote transmission station, said method further having one step from the group consisting of:

controlling said selective [transmission]transfer device to communicate television programming from a selected input source in response to an instruct signal;

controlling said selective [transmission]transfer device to communicate television programming from a selected input source in response to an instruct immediate transmission signal;

controlling said selective [transmission]transfer device to communicate television programming to a storage device in response to an instruct delayed transmission signal; and programming said television transmitter station to respond to a plurality of instruct signal types.

18. The method of claim 13, wherein said information transmission includes digital data, said method further having one step selected from the group of steps consisting of:  
identifying a source of said information transmission based on said display data;  
programming said television transmitter station to select television programming based on said information transmission;  
selecting said television programming based on information contained in said information transmission;  
communicating said television programming from said program input receiver based on said one of decoded and detected said at least one instruct signal; and  
communicating television programming to a storage device based on said information transmission.

19. (Twice Amended) The method of claim 13, wherein said selective [transmission]transfer device is a storage device, said method further comprising one step selected from the group of steps consisting of:

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selecting said storage device based on said selection control signal;  
selecting said storage device based on information contained in said information  
transmission;  
controlling said selective [transmission]transfer device to communicate said television  
programming to said storage device;  
communicating said television programming from said program input receiver to said  
storage device;  
controlling said storage device to one of store and output television programming based  
on one of said selection control signal and said information contained in said information  
transmission;  
passing said at least one instruct signal from said storage device to a second one of a  
decoder and a detector;  
informing said computer of specific television programming stored at said storage device  
based on said at least one instruct signal; and  
controlling said selective [transmission]transfer device to communicate said television  
programming from said storage device.

20. (Twice Amended) A method of communicating television program material from a  
television transmitter station to a plurality of television receiver stations, said television  
transmitter station including a plurality of one of broadcast and cablecast transmitters, a switch  
having a plurality of inputs, a television programming source, a computer, at least one of a  
decoder and a detector, each of said plurality of one of broadcast and cablecast transmitters being  
adapted for transmitting television programming, said switch being operatively connected to said  
plurality of one broadcast cablecast transmitters for communicating said television programming,



said television programming source being operatively connected to one of said plurality of inputs, said computer being operatively connected to at least one of said switch and said television programming source for controlling said at least one of said switch and said television programming source, said at least one of said decoder and said detector being operatively connected to said computer for at least one of decoding and detecting an instruct signal, said method comprising the steps of:

- 15  
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- [(1)] receiving and storing a selection control signal;
  - [(2)] selecting one of said plurality of one of broadcast and cablecast transmitters in accordance with said selection control signal;
  - [(3)] receiving from a remote station one of a broadcast and a cablecast information transmission comprising said instruct signal;
  - [(4)] passing at least some of said one of a broadcast and a cablecast information transmission to said one of said decoder and said detector and one of decoding and detecting said instruct signal;
  - [(5)] controlling said at least one of said switch and said television programming source to communicate said television programming to said selected one of said plurality of one of broadcast and a cablecast transmitters at a specific time based on said instruct signal; and
  - [(6)] transmitting television programming from said television programming source to said plurality of television receiver stations.

21. The method of claim 20, wherein said television programming source receives said television programming from a remote station, and said television programming is transmitted immediately to said plurality of television receiver stations.

22. The method of claim 20, wherein said television programming source includes a storage device, said method further comprising one step selected from the group consisting of:

- selecting said storage device in response to one of said instruct signal;
- controlling said storage device to one of store and communicate said television programming based on said instruct signal;
- passing said instruct signal from said storage device to a second one of a decoder and a detector;
- informing said computer of specific television programming stored at said storage device based on said instruct signal; and
- controlling said switch to communicate said television programming from said storage device to an output device in accordance with one of said selection control signal and said instruct signal.

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23. (Twice Amended) A method of communicating television program material from a television transmitter station to a plurality of television receiver stations, said television transmitter station including a plurality of one of broadcast and cablecast transmitters, a switch having a plurality of inputs, a television programming source, a computer, at least one of a decoder and a detector, each of said plurality of one of broadcast and cablecast transmitters being adapted for transmitting said television program material, said switch being operatively connected to at least one of said plurality of one of broadcast and cablecast transmitters for communicating said television programming, said television programming source being operatively connected to one of said plurality of inputs, said computer being operatively connected to at least one of said switch and said television programming source, said computer being effective for controlling said at least one of said switch and said television programming source, said at least one of said

decoder and said detector being operatively connected to said computer for at least one of decoding and detecting said instruct signal, said method comprising the steps of:

- 6  
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- [(1)] receiving and storing a communication control signal;
  - [(2)] receiving from at least one remote station an information transmission containing an instruct selection signal;
  - [(3)] passing at least some of said information transmission to said at least one of said decoder and said detector and at least one of decoding and detecting said instruct selection signal;
  - [(4)] selecting said at least one of said plurality of one of broadcast and cablecast transmitters in accordance with said instruct selection signal;
  - [(6)] controlling said at least one of said switch and said television programming source to communicate said television program material in accordance with said communication control signal; and
  - [(7)] transmitting said television program material to said plurality of television receiver stations.

24. The method of claim 23, wherein said television programming source receives a television signal and an instruct delayed transmission signal from said at least one remote station, said method further comprising the steps of:

- selecting at least some of said television signal based on one of said communication control signal and said instruct selection signal; and
- communicating said selected television signal from said television programming source to said selected one of a broadcast and a cablecast transmitter immediately.

25. The method of claim 23, wherein said television transmitter station receives said television signal and an instruct immediate transmission signal from said at least one remote station, said method further comprising the steps of:

selecting at least some of said television signal based on one of said communication control signal and said instruct selection signal;  
communicating said selected television signal to said television programming source; and  
storing said selected television signal for delayed transmission.

26. The method of claim 23, wherein said switch includes a plurality of outputs, said method further comprising the steps of:

receiving a television signal from said at least one remote station;  
controlling said switch to communicate said television signal selectively to said one of said plurality one of broadcast and cablecast transmitters, to said storage device and one of said plurality one of broadcast and cablecast transmitters.

27. The method of claim 23, wherein said computer controls said switch and said television programming source, said method further comprising the steps of:

receiving a television signal from said remote stations;  
controlling said switch to communicate at least a portion of said television signal to said television programming source; and  
controlling said television programming source to store said communicated portion of said television signal.

28. The method of claim 27, wherein said switch includes a plurality of outputs, said method further comprising the steps of subsequently:

controlling said television programming source to output said communicated and stored portion of said television signal; and  
controlling said switch to communicate output from said television programming source to one of said plurality of outputs.

## **II. REMARKS**

### **A. Introduction**

The Office Action dated March 25, 1998 (Office Action) has been carefully reviewed and the foregoing amendments made in response thereto.

Claims 5, 7, 10-15, 17, 19, 20 and 23 are amended. Claims 5-28 are pending in the application.

Claims 5-28 are rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention.

Claims 5, 7, 8, and 10 are rejected under 35 U.S.C. § 102 (e) as being anticipated by Dunkerton et al., U.S. Patent No. 4,772,887.

Claims 6, 9, 11-14, 20, 21 and 23-28 are rejected under 35 U.S.C. § 103 (a) as being unpatentable over Cox et al., U.S. Patent No. 4,388,645 in view of Campbell WO 81/02961.

Claims 5-28 remain active in this application. No new matter is presented in the foregoing amendments. Approval and entry of same is respectfully requested.

### **B. Withdrawal of Previous Rejection**

Applicants note with appreciation the withdrawal of the rejection of the claims in the instant application under double patenting based on the broad analysis of *In re Schneller* as set forth in paragraphs 7-10 of the previous Office Action.

**C. Response to Requirement Imposed Upon Applicants to Resolve Alleged Conflicts Between Applicants' Applications.**

Applicants respectfully traverse the requirements of the Office Action paragraph 6.

Paragraph 6 of the Office Action requires Applicants to either:

- (1) file terminal disclaimers in each of the related 328 applications terminally disclaiming each of the other 327 applications; or
- (2) provide an affidavit attesting to the fact that all claims in the 328 applications have been reviewed by applicant and that no conflicting claims exist between the applications; or
- (3) resolve all conflicts between claims in the related 328 applications by identifying how all the claims in the instant application are distinct and separate inventions from all the claims in the above identified 328 applications.

In addition, Examiner states that failure to comply with any one of these requirements will result in abandonment of the application.

Examiner states that the requirement has been made because conflicts exist between claims of the related co-pending applications, including the present application. Examiner sets forth only the serial numbers of the co-pending applications without an indication of which claims are conflicting. Examiner has also attached an Appendix providing what is deemed to be clear evidence that conflicting claims exist between the 328 related co-pending applications and the present application. Further, Examiner states that an analysis of all claims in the 328 related co-pending applications would be an extreme burden on the Office requiring millions of claim comparisons.

Applicants respectfully traverse these requirements in that Examiner has both improperly imposed the requirements, and has incorrectly indicated that abandonment will occur upon failure to comply with the requirement. Applicants' traversal is supported by the fact that 37 C.F.R. § 1.78 (b) does not, under the present circumstances, provide Examiner with authority to require Applicants to either: 1) file terminal disclaimers; 2) file an affidavit; or 3) resolve all apparent conflicts. Additionally, the penalty of abandonment of the instant application for failure to comply

with the aforementioned requirement is improper for being outside the legitimate authority to impose abandonment upon an application. The following remarks in Section (B) will explain Applicants' basis for this traversal.

**1. The PTO's New Requirement is an Unlawfully Promulgated Substantive Rule Outside the Commissioner's Statutory Grant of Power**

The PTO Commissioner obtains his statutory rulemaking authority from the Congress through the provisions of Title 35 of the United States Code. The broadest grant of rulemaking authority -- 35 U.S.C. § 6 (a) -- permits the Commissioner to promulgate regulations directed only to "the conduct of proceedings in the [PTO]". This provision does NOT grant the Commissioner authority to issue substantive rules of patent law. Animal Legal Defense Fund v. Quigg, 932 F.2d 920, 930, 18 USPQ2d 1677, 1686 (Fed. Cir. 1991).<sup>1</sup> Applicants respectfully submit that the Examiner's creation of a new set of requirements based upon 37 CFR § 1.78(b) constitutes an unlawful promulgation of a substantive rule in direct contradiction of a long-established statutory and regulatory scheme.

**2. The PTO's Requirement is a Substantive Rule**

The first determination is whether the requirement as imposed by the PTO upon Applicants is substantive or a procedural rule. The Administrative Procedure Act offers general guidelines under which all administrative agencies must operate. A fundamental premise of administrative law is that administrative agencies must act solely within their statutory grant of power. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The PTO Commissioner has NOT been granted power to promulgate substantive rules of patent law. *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996), citing, *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 930, 18 USPQ2d 1677, 1686 (Fed. Cir. 1991).

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<sup>1</sup> Accord *Hoechst Aktiengesellschaft v. Quigg*, 917 F.2d 522, 526, 16 USPQ2d 1549, 1552 (Fed. Cir. 1990); *Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 398-99, 13 USPQ2d 1628, 1632-33 (Fed. Cir. 1990); *Ethicon Inc. v. Quigg*, 849 F.2d 1422, 1425, 7 USPQ2d 1152, 1154 (Fed. Cir. 1988).

The appropriate test for such a determination is an assessment of the rule's impact on the Applicants' rights and interests under the patent laws. *Fressola v. Manbeck*, 36 USPQ2d 1211, 1215 (D.D.C. 1995). As the PTO Commissioner has no power to promulgate substantive rules, the Commissioner receives no deference in his interpretation of the statutes and laws that give rise to the instant requirement. *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996), citing, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). When agency rules either (a) depart from existing practice or (b) impact the substantive rights and interests of the effected party, the rule must be considered substantive. *Nat'l Ass'n of Home Health Agencies v. Scheiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

**a. The PTO Requirement is Substantive Because it Radically Changes Long Existing Patent Practice by Creating a New Requirement Upon Applicants Outside the Scope of 37 C.F.R. § 1.78 (b)**

The Examiner's requirement is totally distinguishable from the well articulated requirement authorized by 37 CFR § 1.78 (b), because it (1) creates and imposes a new requirement to avoid abandonment of the application based on the allegation that conflicts exist between claims of the related 328 co-pending applications, and (2) it results in an effective final double patenting rejection without the PTO's affirmative double patenting rejection of the claims. Long existing patent practice recognizes only two types of double patenting, double patenting based on 35 U.S.C. § 101 (statutory double patenting) and double patenting analogous to 35 U.S.C. § 103 (the well-known obviousness type double patenting).<sup>2</sup> These two well established

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<sup>2</sup>MPEP § 804(B)(1) states, in an admittedly awkward fashion, that the inquiry for obviousness type double patenting is analogous to a rejection under 35 U.S.C. 103: "since the analysis employed in an obvious-type double patenting determination parallels the guidelines for a 35 U.S.C. 103 rejection, the factual inquires set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103 are employed when making an obvious-type double patenting analysis".



types of double patenting use an objective standard to determine when they are appropriate<sup>3</sup> and have a determinable result on the allowability of the pending claims.

The Examiner's new requirement represents a radical departure from long existing patent practice relevant to conflicting claims between co-pending applications of the same inventive entity. Two well established double patenting standards are based on an objective analysis of comparing pending and *allowed* claims. However, in the present application, there are no *allowed* claims. The Examiner's new requirement to avoid a double patenting rejection presumes that conflicts exist between claims in the present application and claims in the 327 copending applications. This presumption of conflicts between claims represents a radical departure from long existing patent practice as defined by 37 C.F.R. § 1.78 (b), which states:

Where two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application.

Clearly, the only requirement authorized by the rule is the elimination of conflicting claims from all but one application where conflicting claims have been determined to exist. Furthermore, in order to determine that conflicting claims do in fact exist in multiple applications, the only possible analysis is obviousness-type double patenting, since there are no allowed or issued claims by which to employ the 35 U.S.C. § 101 statutory double patenting analysis. Once obviousness-type double patenting analysis has been applied and conflicting claims have been determined to exist, only a *provisional* obviousness-type double patenting rejection is possible until claims from one application are allowed.

In summary, the Examiner's new requirement departs from long-established practice because it (1) creates and imposes a new requirement to avoid abandonment of the application

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<sup>3</sup> The objective test for same invention double patenting is whether one of the claims being compared could be literally infringed without literally infringing the other. The objective test for obviousness type double patenting is the same as the objective nonobviousness requirement of patentability with the difference that the disclosure of the first patent may not be used as prior art.

based on the allegation that conflicts exist between claims of the related 328 co-pending applications, and (2) it results in an effective final double patenting rejection without the PTO's affirmative double patenting rejection of the claims.

Therefore, the Examiner's new requirement departs from existing practice and therefore is a **substantive rule** beyond the authority of the PTO and is therefore, invalid.

**b. The New Requirement is Also a Substantive Rule  
Because it Adversely Impacts the Rights and  
Interests of Applicants to Benefits of the Patent**

The rights and benefits of a U.S. patent is solely a statutory right. *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996). The essential statutory right in a patent is the right to exclude others from making, using and selling the claimed invention during the term of the patent. Courts have recognized that sometimes new procedural rules of the PTO are actually substantive rules, e.g. when the new rule made a substantive difference in the ability of the applicant to claim his discovery. *Fressola v. Manbeck*, 36 USPQ2d 1211, 1214 (D.D.C. 1995) (emphasis added), citing, *In re Pilkington*, 411 F.2d 1345, 1349; 162 USPQ 145 (CCPA 1969); and *In re Steppan*, 394 F.2d 1013, 1019; 156 USPQ 143 (CCPA 1967).

The new requirement, on its face and as applied here, is an instance of a PTO rule making a substantive difference in Applicants' ability to claim their invention and, therefore, must be considered a substantive rule. The requirement denies Applicants rights and benefits expressly conferred by the patent statute. The measure of the value of these denied rights and benefits is that the requirement, as applied here, would deny Applicants the full and complete PTO examination of Applicants' claims on their merits, as specified by 37 C.F.R. § 1.105. In addition, to file terminal disclaimers in each of the related 328 applications terminally disclaiming each of the other 327 applications based on the PTO's incomplete examination on the merits would deny Applicants the benefit of the full patent term of 17 years on each of Applicants' respective applications. Applicants respectfully submit that the requirement has a huge impact on their rights and interests in the presently claimed invention.

**c. Conclusion: Substantive Rule**

In summary, the requirement is a change to long existing practice and/or has a substantive impact on the rights and interests of Applicants to their invention. Either finding means that the new requirement is a substantive rule. Since the Commissioner has no power to issue substantive rules, the requirement is an improperly promulgated substantive rule having no force of law.

**3. The PTO Requirement is Outside the Scope of 37 C.F.R. § 1.78 (b)**

Rule 78 (b) states that:

Where two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application.

The only **requirement** that Rule 78 (b) authorizes is the elimination of conflicting claims from all but one co-pending applications.

In the instant Office Action, Examiner has not required the elimination of all conflicting claims from all but one application, but instead has required Applicants to: 1) file terminal disclaimers in each of the related 328 applications; 2) provide an affidavit; or 3) resolve all conflicts between claims in the related 328 applications. None of the options in the requirement is authorized by Rule 78 (b), and therefore Applicants respectfully submit that such a requirement is improper.

With respect to the PTO's authority to act within Rule 78 (b) regarding the rejection of conflicting claims, MPEP § 822.01 states that:

Under 37 CFR § 1.78 (b), the practice relative to overlapping claims in applications copending before the examiner..., is as follows: Where claims in one application are unpatentable over claims of another application of the same inventive entity because they recite the same invention, *a complete examination should be made of the claims of each application* and all appropriate rejections should be entered in each application, including rejections based upon prior art. *The claims of each application may also be rejected on the grounds of provisional double patenting on the claims of the other application* whether or not any claims avoid the prior art. Where appropriate, the same prior art may be

relied upon in each of the applications. MPEP 822.01 (6th Ed., Rev. 3, 1997), (*emphasis added*).

In light of the requirement of the Office Action, MPEP § 822.01 and 37 CFR § 1.78 (b) are not applicable since there has not been any rejection with regard to the elimination of conflicting claims from all but one co-pending application.

**4. The Assertion That Failure to Comply with the Requirement Will Result in Abandonment of Applicants' Application is Improper**

Applicants' prospective failure to comply with the above requirements cannot properly result in abandonment of the present application. Applicants respectfully submit that abandonment of an application can properly occur only:

- (1) for failure to respond within a provided time period (under Rule 135);
- (2) as an express abandonment (under Rule 138); or
- (3) the result of failing to timely pay the issue fee (under Rule 316).

There is no provision in the rules permitting abandonment for failure to comply with any of the presented requirements. To impose an improper requirement upon Applicants and then hold the application is to be abandoned for failure to comply with the improper requirement violates the rules of practice before the USPTO. Furthermore, Examiner is in effect attempting to create a substantive rule which is above and beyond the rulemaking authority of the USPTO, and therefore is invalid.

In the *Application of Mott*, 539 F.2d 1291, 190 USPQ 536 (CCPA 1976), the applicant had conflicting claims in multiple applications. The CCPA held that action by the Examiner which would result in automatic abandonment of the application was legally untenable. *Id.* at 1296, 190 USPQ at 541. In the present application, Examiner has asserted that there are conflicting claims in multiple applications, and that non-compliance of the Office Action's requirement will result in an automatic abandonment. Therefore, under *Mott's* analysis, the Office Action's result of abandonment of Applicants' application is legally untenable.

## **5. Response to Apparent Conflict of Claims**

Applicants submit that the presentation of the Office Action Appendix fails to demonstrate any conflicts between claims of the present application and claims of the co-pending applications. Rather, the Office Action Appendix compares representative claims of *other* applications in attempt to establish that “conflicting claims exist between the 328 related co-pending applications.” Absent any evidence of conflicting claims between the Applicants’ present application and any other of Applicants’ co-pending applications, any requirement imposed upon Applicants to resolve such alleged conflicts is improper.

## **6. Request for Withdrawal of Requirement**

Therefore, Applicants respectfully request that Examiner reconsider and withdraw the requirement that Applicants: (1) file terminal disclaimers in each of the related 328 applications terminally disclaiming each of the other 327 applications; (2) provide an affidavit attesting to the fact that all claims in the 328 applications have been reviewed by applicant and that no conflicting claims exist between the applications; or (3) resolve all conflicts between claims in the above identified 328 applications by identifying how all the claims in the instant application are distinct and separate inventions from all the claims in the above identified 328 applications, which upon failing to do so will abandon the application.

## **7. Filing of Supplemental Oath**

Notwithstanding the foregoing, Applicants will file a supplemental oath under 37 C.F.R. § 1.67 for each application when Examiner identifies allowable subject matter. Applicants respectfully propose that the filing of individual supplemental oaths attesting to the absence of claim conflicts between previously patented claims and subsequently allowed claims is a more reasonable method of ensuring the patentable distinctness of subsequently allowed claims.

Under 37 C.F.R. § 1.105, § 1.106 & § 1.78 (b), Examiner has the duty to make every applicable rejection, including double patenting rejection. Failure to make every proper rejection denies Applicants all rights and benefits related thereto, e.g., Applicants’ right to appeal, etc.

Once obviousness-type double patenting analysis has been applied and conflicting claims have been determined to exist, only a *provisional* obviousness-type double patenting rejection is possible until claims from one application are allowed.

#### **D. Information Disclosure Statement**

The Applicants appreciate the Examiner's review of the Information Disclosure Statements filed April 7, 1997 and have addressed those specific concerns raised in paragraph 7 of the Office Action. It is the Applicants' understanding that the Examiner raised the following 5 issues:

- (1) the reasons for such a large number of references cited,
- (2) foreign language references cited without a statement of relevance or translation have not been considered,
- (3) the relevancy of numerous references listed in the Information Disclosure Statements are subsequent to the Applicants' latest effective filing date of 11/3/81,
- (4) citation of references apparently unrelated to the subject matter of the claimed invention, and
- (5) citation of database search results listed in foreign languages where no copy was provided.

##### **1. Reason for Citation of Large Number of References**

The reason that the Applicants submitted such a large number of references in the Information Disclosure Statements was that a large portion of the information cited by the Applicants was brought to the Applicants' attention in the discovery processes in a previous litigation in the United States District Court for the Eastern District of Virginia (*Personalized Mass Media Corp. v. The Weather Channel, Inc.* Docket No. 2:95 cv 242) and an investigation by the International Trade Commission (*In the Matter of Certain Digital Satellite System (DSS) Receivers And Components Thereof*, No. 337 TA 392, which was direct to U.S. Pat. No. 5,335,277) regarding claims in the Applicants' related issued patents. The documents listed in the

Information Disclosure Statement were cited during the previous litigation/investigative proceedings by the alleged infringers in the aforementioned proceedings as being relevant and material to patentability of the claims in the related patents. The Applicants submitted those materials in the Information Disclosure Statement to the PTO at the earliest possible time in order to file them in compliance with the 3 month requirement stated in the certification used to submit the Information Disclosure Statement before the Office Action was issued as is necessary under 37 CFR § 1.97 (c) (1). In such haste, entries were inadvertently submitted which do not appear on their face to be material to the patentability of the present application. Applicants have corrected this error with the submission of the corrected Information Disclosure Statement as shown in Appendix B. However, it is the Applicants' understanding that not all references cited must be material to patentability in order for such references to be considered. In § 609 of the MPEP, it states,

“[t]hese individuals also may want the Office to consider information for a variety of reasons: e.g., without first determining whether the information meets any particular standard of materiality, or because another patent office considered the information to be relevant in a counterpart or related patent application filed in another country, or to make sure that the examiner has an opportunity to consider the same information that was considered by the individuals that were substantially involved in the preparation or prosecution of a patent application.”

Applicants' position is that information that was considered material in previous litigation would fall into the 'variety of reasons' category as stated above. Applicants intention was not to confuse or make difficult the examination process for the Examiner, but was instead to be forthright and open in disclosing all information deemed to be relevant to the application in issue by third parties.

## **2. Citations of Foreign Language References**

Applicants have re-examined the foreign references listed in all of the Information Disclosure Statements and have either eliminated such references from the list, included translations herewith or provided statements as to the relevancy of such references (APPENDIX A). The inclusion of translations with this response is in compliance with 37 C.F.R. § 1.97 (f)

which states in part, “[I]f a bona fide attempt is made to comply with 37 C.F.R. § 1.98, but part of the required content is inadvertently omitted, additional time may be given to enable full compliance.” The omission of any translations and/or relevancy statements for foreign references were inadvertent and unintentional and are herein submitted in accordance with 37 C.F.R. § 1.97 (f).

**3. References in the Information Disclosure Statements  
Subsequent to Applicants’ Latest Effective Filing Date  
of 9/11/87**

Examiner stated “[n]umerous references listed in the IDS are subsequent to the applicant’s latest effective filing date of 9/11/87, therefore, the relevancy of those references is unclear.” Upon further examination, the Applicants have eliminated those patents and publications after the effective filing date for the present application. It is the Applicants’ understanding that the effective filing date for the present application is 11/3/81.

**4. Citation of Unrelated References**

Applicants appreciate the Examiner pointing out such references that were listed yet on their face appear to be unrelated to the subject matter of the present application. In response to such information, the Applicants have reviewed the cited references and removed any such references which appear to be unrelated on their face to the claimed subject matter such as the patent for a beehive, the patent for a chemical compound and numerous computer printout search results.

**5. Citation of Database Search Results**

Database search results listed in foreign languages where no copy was provided have been eliminated from the substitute Information Disclosure Statement included with this office action.

The Applicants offer the corrected Information Disclosure Statement (APPENDIX B) as a substitute to the previously filed Information Disclosure Statement filed 4/7/97. No new entries have been entered, only citations which have, upon further examination, been determined not to be relevant to the claimed subject matter have been eliminated, typographical errors have been



corrected, dates inserted where possible and the list shortened as a result. It is the Applicants' intention that such corrected Information Disclosure Statement will help clarify any issues previously raised by the Examiner and aid in the prosecution of the present patent application.

**E. Response to Rejections under 35 U.S.C. § 112**

**1. Specification Support of Claims 5-28**

Paragraph 8 of the Office Action rejects claims 5-28 under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention. The Office Action specified the below listed language as not being supported by the specification as originally filed.

The following tables list Applicants' claim language in the left column which corresponds to the specification support in the right column.

As it is today, "Wall Street Week" was in 1981 a well known Public Broadcasting System program that originated in Owings Mills, Maryland and was rebroadcast all over the United States. The "television studio originating ['Wall Street Week']" is disclosed at col. 19 lines 61-62. As an "[illustration of] one instance of ... the use of Signal Processing Apparatus and Methods ... a cable television system ... that cablecasts several channels of television programming" is disclosed at col. 10 lines 24-28. Among the "programming being cablecast on the multi-channel system ... 'Wall Street Week' is being televised on channel X. " (col. 19 lines 14-23)

Like "Wall Street Week", the programming of Julia Child, including "the French Chef," was in 1981 well known Public Broadcasting System television programming. Julia Childs' "The French Chef" is such program is disclosed at col. 20 lines 19-20.

Origination transmitter	For example, col. 19, lines 60-63.
Remote intermediate broadcast or cablecast transmitter	For example, col. 10, lines 14-28 and lines 43-47.
Selective transfer devices	For example, col. 10, lines 42-43 and col. 11, lines 45-46.

## **2. Conclusion**

Applicants respectfully submit that claims 6, 8-9, 16, 18, 21-22, 24-28 and amended claims 5, 7, 10-15, 17, 19, 20 and 23 of the subject application particularly point out and claim the subject matter sufficiently for one of ordinary skill in the art to comprehend the bounds of the claimed invention. The test for definiteness of a claim is whether one skilled in the art would understand the bounds of the patent claim when read in light of the specification, and if the claims so read reasonably apprise those skilled in the art of the scope of the invention, no more is required. *Credle v. Bond*, 25 F.3d 1556, 30 USPQ2d 1911 (Fed. Cir. 1994). The legal standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope. *In re Warmerdam*, 33 F.3d 1354, 31 USPQ2d 1754 (Fed. Cir. 1994). Applicants have amended the claims to enhance clarity and respectfully submit that all pending claims are fully enabled by the specification and distinctly indicate the metes and bounds of the claimed subject matter.

Applicants believe that the above recited changes are sufficient to overcome the rejections under 35 U.S.C. 112, first and second paragraph, and respectfully request withdrawal of these rejections. Applicants provide these specific embodiments in support of the pending claims by way of example only. The claims must be read as broadly as is reasonable in light of the specification, and Applicants in no way intend that their submission of excerpts/examples be construed to unnecessarily restrict the scope of the claimed subject matter.

### **F. Response to Rejection of Claims for Absence of Novelty**

#### **1. 35 U.S.C. § 102 (e) Rejection over Dunkerton et al., U.S. Patent No. 4,772,887.**

Claims 5, 7, 8, and 10 are rejected under 35 U.S.C. § 102 (e) as being anticipated by Dunkerton et al., U.S. Patent No. 4,772,887. The effective filing date of Dunkerton et al. is August 5, 1983 which is subsequent to Applicants' effective filing date of November 3, 1981. Applicants contend that Dunkerton et al. is unavailable as a reference under 35 U.S.C. § 102 (e)

as suggested in the Final Office Action. The Final Office Action suggests that the subject matter claimed in the present application is disclosed in Figs. 7 and 8 which are not in patent No. 4,694,490. While some of the claimed subject matter is arguably present in Figs. 7 and 8, that is not *prima facie* evidence that the subject matter is not claimed in the '490 patent. Applicants contend that the specification support provided herein, as requested by the Final Office Action, is sufficient to demonstrate priority to U.S. Patent No. 4,694,490.

### **G. Response to Obviousness Rejection of Claims**

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference to combine the teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references combined) must teach or suggest all the claim recitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not based on Applicants' disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). MPEP 706.02(j).

#### **1. 35 U.S.C. § 103 (a) Rejection over Cox et al. U.S. Patent No. 4,388,645 in view of Campbell et al. WO 81/02961.**

Claims 6, 9, 11-14, 20, 21 and 23-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cox et al., U.S. Patent No. 4,388,645 in view of Campbell et al., WO 81/02961. The Office Action fails to set forth how each reference, either alone or in combination, teaches each and every limitation of the claimed invention. In fact, the Office Action makes no mention of how Campbell et al. teaches any limitation of the present claims. The rejection, in its entirety states that Cox et al. teaches transmitting television programming and that images are output by Cox et al. in sequence. While Applicants agree that Cox et al. outputs teletext pages in sequence, that fact alone certainly does not render the present claims obvious. Although the Office Action has failed to set forth how the cited references render the present claims obvious, in

order to continue the prosecution of the present application, Applicants will address each claim below.

**a. Independent Claim 11**

With respect to Applicants' claim 11, Cox et al. in view of Campbell et al. fails to, *inter alia*, teach or suggest all the claim recitations, i.e., receiving said at least one control signal, which at said remote intermediate television transmitter station operates to control communication of said television programming. There is no suggestion in Cox et al. of a control signal which operates to communicate television programming. The Office Action provides no language from the specification of Cox et al. to support the contention that Cox et al. teaches such a control signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of transmitting said at least one control signal to said at least one origination transmitter before a specific time. There is no suggestion in Cox et al. of transmitting anything before a specific time. The Office Action simply states that Cox et al. transmits teletext pages in sequence. The transmission of pages in sequence is certainly not analogous to the transmission of anything before a specific time. Additionally, since there is no teaching of a control signal in Cox et al., there is certainly no teaching of transmitting a control signal as suggested.

Applicants respectfully request that the 35 U.S.C. §103(a) rejection of claim 11 be withdrawn.

**b. Independent Claim 12**

With respect to Applicants' claim 12, Cox et al. in view of Campbell et al. fails to, *inter alia*, teach or suggest all the claim recitations, i.e., receiving data at said intermediate data transmitter station, said data including at least one of video, audio, text, remote control signals, and an instruct signal which is operable to transmit some of said data from said plurality of remote receiver stations. There is no suggestion in Cox et al. of receiving data at the transmitter station which includes remote control signals and instruct signals.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of receiving said at least one control signal at said intermediate data transmitter station, said one or more control signals being operative to delay transmission of at least a portion of said data. There is no teaching in Cox et al. of a control signal which is operative to delay transmission in any fashion. Cox et al. merely teaches the transmission of teletext pages in sequence, without the ability to delay a portion of the data. While a user may request a certain page, all pages must be transmitted in sequence before the desired page is transmitted. There can be no delay of the transmission of any pages.

Since there is no teaching of an instruct signal or a control signal as presently claimed, it follows that there can be no teaching of the Applicants' claim limitation of transmitting said data, said instruct signal and said at least one control signal from said intermediate data transmitter station to said plurality of remote receiver stations.

Applicants respectfully request that the 35 U.S.C. §103(a) rejection of claim 12 be withdrawn.

**c. Independent Claim 13**

With respect to Applicants' claim 13, Cox et al. in view of Campbell et al. fails to, *inter alia*, teach or suggest all the claim recitations, i.e., receiving and storing a selection control signal. There is no suggestion in Cox et al. of a selection control signal. The Office Action makes no suggestion of any such signal being taught in Cox et al. The only signal that resembles such a control signal is the viewer's response to the teletext menus. However, there is no suggestion that such a signal functions as Applicants' claimed selection control signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of receiving from at least one remote transmission station an information transmission containing said at least one television signal and at least one instruct signal. There is no concept of an instruct signal in Cox et al. as presently claimed. As indicated above, the viewer's response is arguably analogous to Applicants' control signal. Assuming, *arguendo*, that it is analogous to the claimed control signal, there is certainly no possibility for the viewer's response in Cox et al.

to also be analogous to the instruct signal. There is certainly not any concept of an instruct signal being received from a remote transmission station in Cox et al.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of passing at least some of said at least one television signal to said at least one of said decoder and said detector and at least one of decoding and detecting said at least one instruct signal. Since there is no teaching of an instruct signal as presently claimed, there is no concept of decoding or detecting such an instruct signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of controlling said selective transfer device to communicate said at least one receiver control signal based on said selection control signal and said at least one of decoded and detected at least one instruct signal. There is no concept of controlling any selection transfer device as presently claimed. Since there is no concept of a selection control signal as noted above, there is certainly no concept of controlling a transfer device based on such a control signal. Additionally, since there is no instruct signal as presently claimed, there can be no controlling of a transfer device based on such an instruct signal. Furthermore, there is no concept of a receiver control signal as presently claimed. There is no suggestion of any signal taught in Cox et al. which functions as a receiver control signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of communicating said television signal from said at least one television programming source to at least one of said one of a broadcast and a cablecast transmitter based on said step of controlling said selective transfer device. Since Cox et al. fails to teach the Applicants' claimed controlling step, there is no concept of communicating a television signal based on said step of controlling.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of transmitting said television signal and said at least one receiver control signal to said one or more television receiver stations. Since there is no concept of a receiver control signal as presently claimed, there is certainly no concept of transmitting such a control signal.

Applicants respectfully request that the 35 U.S.C. §103(a) rejection of claim 13 be withdrawn.

**d. Independent Claim 20**

With respect to Applicants' claim 20, Cox et al. in view of Campbell et al. fails to, *inter alia*, teach or suggest all the claim recitations, i.e., receiving and storing a selection control signal. There is no suggestion in Cox et al. of a selection control signal. The Office Action makes no suggestion of any such signal being taught in Cox et al. The only signal that resembles such a control signal is the viewer's response to the teletext menus. However, there is no suggestion that such a signal functions as Applicants' claimed selection control signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of selecting one of said plurality of one of broadcast and cablecast transmitters in accordance with said selection control signal. Since there is no concept of a selection control signal in Cox et al., there is certainly no suggestion of selecting a transmitter in accordance with said selection control signal. Assuming, *arguendo*, that there is a selection control signal taught in Cox et al., there is still no concept of selecting a transmitter as presently claimed.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of receiving from a remote station one of a broadcast and a cablecast information transfer comprising said instruct signal. There is no concept of an instruct signal in Cox et al. as presently claimed. As indicated above, the viewer's response is arguably analogous to Applicants' selection control signal. Assuming, *arguendo*, that it is analogous to the claimed control signal, there is certainly no possibility for the viewer's response in Cox et al. to also be analogous to the instruct signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of passing at least some of said one of a broadcast and a cablecast information transmission to said one of said decoder and said detector and one of decoding and detecting said instruct signal. Since there is no teaching of an instruct signal as presently claimed, there is no concept of decoding or detecting such an instruct signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of controlling said at least one of said switch and said television programming source to communicate said television programming to said selected one of said plurality of one of broadcast and a cablecast transmitters at a specific time based on said instruct signal. There is no concept in Cox et al. of controlling a switch and a programming source to communicate television programming based on an instruct signal since there is no concept of an instruct signal as presently claimed. There is certainly no suggestion of communicating any programming at a specific time. As noted above, the pages in Cox et al. are read in sequence and are not transmitted at a specific time.

Applicants respectfully request that the 35 U.S.C. §103(a) rejection of claim 20 be withdrawn.

**e. Independent Claim 23**

With respect to Applicants' claim 23, Cox et al. in view of Campbell et al. fails to, *inter alia*, teach or suggest all the claim recitations, i.e., receiving and storing a communication control signal. There is no suggestion in Cox et al. of a communication control signal. The Office Action makes no suggestion of any such signal being taught in Cox et al. The only signal that resembles such a control signal is the viewer's response to the teletext menus. However, there is no suggestion that such a signal functions as Applicants' claimed communication control signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of receiving from at least one remote station an information transmission containing an instruct selection signal. There is no concept of an instruct selection signal in Cox et al. as presently claimed. As indicated above, the viewer's response is arguably analogous to Applicants' selection control signal. Assuming, *arguendo*, that it is analogous to the claimed selection control signal, there is certainly no possibility for the viewer's response in Cox et al. to also be analogous to the instruct selection signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of passing at least some of said information transmission to said at least one of said



decoder and said detector and at least one of decoding and detecting said instruct selection signal. Since there is no teaching of an instruct selection signal as presently claimed, there is no concept of decoding or detecting such an instruct selection signal. It follows that there is no teaching of selecting said at least one of said plurality of one of broadcast and cablecast transmitters in accordance with said instruct selection signal.

Cox et al., either alone or in combination, fails to teach, *inter alia*, the Applicants' claim limitation of controlling said at least one of said switch and said television programming source to communicate said television program material in accordance with said communication control signal. There is no concept in Cox et al. of controlling a switch and a programming source to communicate television programming in accordance with a communication control signal since there is no concept of such a communication control signal as presently claimed.

Applicants respectfully request that the 35 U.S.C. §103(a) rejection of claim 23 be withdrawn.

**f. Dependent Claims 6, 9, 14, 21 and 24-28**

Claims 6 and 9 depend upon independent claim 5. Claim 14 depends upon independent claim 13. Claim 21 depends upon independent claim 20. Claims 24-28 depend upon independent claim 23. As discussed *supra*, Dunkerton et al. fails to anticipate independent claim 5, and thus, *ipso facto*, Dunkerton et al. fails to anticipate dependent claims 6 and 9. As discussed *supra*, Cox et al. in view of Campbell et al. fails to disclose every element of independent claims 13, 20 and 23 and thus, *ipso facto*, Cox et al. in view of Campbell et al. fails to anticipate dependent claims 14, 21 and 24-28, and therefore, this rejection should be withdrawn and the claims be permitted to issue. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988).